Tradesmen International *and* International Brotherhood of Electrical Workers, Local Union No. 545, a/w The International Brotherhood of Electrical Workers, AFL–CIO. Case 17–CA–20952

October 31, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On November 27, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed an exception and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exception.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The case involves three rules maintained by the Respondent in an employee manual: (1) a no-solicitation rule prohibiting employees from soliciting "during times they are expected to be working," (2) a "Conflicts of Interest" rule, and (3) a rule prohibiting "statements which are slanderous or detrimental" to the Company or its employees. The General Counsel alleged that the mere maintenance of each rule violated Section 8(a)(1) because it would reasonably tend to chill employees in the exercise of their Section 7 rights.

The judge found that the Respondent did not violate Section 8(a)(1) by maintaining its no-solicitation rule. For the reasons stated by the judge, we agree. Accordingly, we dismiss this allegation.

The judge found that the Respondent did violate Section 8(a)(1) by maintaining certain provisions of its "Conflicts of Interest" rule and by maintaining the rule prohibiting "slanderous or detrimental" statements. For the reasons stated below, we reverse and also dismiss these allegations.

I. LEGAL STANDARD

If we were deciding this case on a clean slate, we would evaluate the Respondent's rules under the standard in then-Member Hurtgen's partial dissent in *Lafayette Park Hotel*, 326 NLRB 824, 834 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (then-Member Hurtgen, concurring in part, dissenting in part). However, in the absence of a three-member Board majority to overrule *Lafayette Park*, we apply the standard set forth by a majority of the Board in that case. Under that standard, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Id. at 825. The General Counsel must prove that the rules can reasonably be interpreted in a way that infringes on Section 7 activity. As explained below, that burden was not met here.

II. "CONFLICTS OF INTEREST" RULE

The Respondent's employee manual contains a rule entitled "Conflicts of Interest," which prohibits employees from engaging in any activity that "conflicts with, or appears to conflict with, the interests of the company, its customers, or its suppliers." The rule further provides in relevant part:

> Employees are expected to represent the company in a positive and ethical manner and have an obligation both to avoid conflicts of interest and to refer questions and concerns about potential conflicts to their supervisor . . . .
>
> Employees are not to engage, directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company. Such prohibited activity also includes any illegal acts in restraint of trade. Tradesmen defines such disloyal, disruptive, competitive, or damaging conduct as including, but not limited to, employment with another employer or organization while employed by Trades-men . . . .

There is no evidence regarding enforcement of any provisions of the rule.

The judge found that the Respondent violated Section 8(a)(1) by maintaining the provision requiring employees to represent the Company in a "positive" manner and the provision prohibiting employees from engaging in conduct that is "disloyal, disruptive, competitive, or damaging to the company." We reverse.

A. Prohibition on "Disloyal, Disruptive, Competitive, or Damaging" Conduct

The prohibition on "disloyal, disruptive, competitive, or damaging" conduct is similar to rules found lawful in cases applying the *Lafayette Park* standard. In *Lafayette Park*, itself, a majority of the Board held that the respondent did not violate Section 8(a)(1) by maintaining a rule prohibiting "[b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives." 326 NLRB at 825–826. The Board found that the rule addressed legitimate

[1] There are no exceptions to the judge's dismissal of the allegations that the Respondent discharged employee Russell Terrell in violation of Sec. 8(a)(3) and (1), prohibited employees from discussing wages in violation of Sec. 8(a)(1), and maintained confidentiality and "dual employment" policies in its employee manual that violated Sec. 8(a)(1).

business concerns, and that any ambiguity in the rule arose only from "parsing the language of the rule, viewing the phrase 'goals and objectives' in isolation, and attributing to the Respondent an intent to interfere with employee rights," which the Board declined to do. See id. The Board also found that the respondent did not violate Section 8(a)(1) by maintaining a rule prohibiting "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community." The Board found that employees would not reasonably fear that the respondent would use the rule to punish them for engaging in protected activity, but would recognize that the rule was intended to reach serious misconduct. See id. at 827; see also *Ark Las Vegas Restaurant Corp*., 335 NLRB 1284 fn. 2, 1292–1293 (2001) (respondent did not violate Sec. 8(a)(1) by maintaining a rule prohibiting "any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests . . ."); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–289 (1999) (respondent did not violate Sec. 8(a)(1) by maintaining a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel").[2]

For the same reasons, we find the Respondent's prohibition on "disloyal, disruptive, competitive, or damaging" conduct to be lawful. Like the rules in issue in *Lafayette Park* and its progeny, the Respondent's rule addresses legitimate business concerns. Indeed, the case for dismissing the 8(a)(1) complaint is even stronger here. Unlike the rules in the above decisions, the Respondent's rule also gives examples of the types of conduct it proscribes. These examples—illegal acts in restraint of trade and employment with another organization while employed by the Respondent—would clarify to a reasonable employee that Section 7 activity is not the type of conduct proscribed by the rule. Therefore, contrary to our dissenting colleague, we do not believe that the Respondent's prohibition on "disloyal, disruptive, competitive, or damaging" conduct can reasonably be read as encompassing Section 7 activity. Reading this language in context, employees would recognize that it was intended to reach conduct similar to the examples given in the rule, not conduct protected by the Act. See *Aroostook County Regional Ophthalmology Center*, 81 F.3d 209, 212–213 (D.C. Cir. 1996) (relying on context of rule and its location in the manual to conclude that rule was not unlawful on its face).

In addition, the Respondent has not by other actions led employees to believe that the rule prohibits Section 7 activity. Thus, there is no evidence that the Respondent has enforced the rule against employees for engaging in such activity, that the Respondent promulgated the rule in response to union or protected activity, or even that the Respondent exhibited antiunion animus. See *Lafayette Park*, supra at 826 (relying in part on the absence of such evidence to find that a rule of conduct did not violate Sec. 8(a)(1)).

Therefore, we find that the General Counsel has not met his burden to show that the prohibition on "disloyal, disruptive, competitive, or damaging" conduct would reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, we reverse the judge and dismiss this allegation.

B. Requirement that Employees Represent the Company in a "Positive and Ethical Manner"

The judge also found that the Respondent violated Section 8(a)(1) by maintaining the provision in the "Conflicts of Interest" rule stating that employees "are expected to represent the company in a positive and ethical manner." The judge reasoned that employees who expressed opinions that the Respondent paid low wages or treated them unfairly could be seen as failing to represent the Company in a "positive" manner. We disagree that this provision violated Section 8(a)(1).

[2] We find *GHR Energy Corp*., 294 NLRB 1011 (1989), affd. 924 F.2d 1055 (5th Cir. 1991), which also involved a disloyalty policy, distinguishable in several material respects. First, the complaint in *GHR* alleged that the respondent unilaterally promulgated the policy in violation of Sec. 8(a)(5) and (1). In addressing this issue, the Board examined (1) whether the respondent had overcome a presumption that it must bargain over the policy by showing that the subject matter of the policy involved "protection of the core purposes of the enterprise" and (2) if so, whether the policy was unambiguous and narrowly tailored to the employer's legitimate and necessary objectives. It was in this context that the Board discussed the policy's overbreadth. See 294 NLRB at 1012. In the present case, in contrast, there is no 8(a)(5) allegation. Second, although the Board adopted the judge's finding that the policy also violated Sec. 8(a)(1), it emphasized that the policy specifically singled out as disloyal any statement that could be interpreted as "interfering with [the respondent's] ability to expand and grow." The Board therefore found that the prohibition extended to actions and statements that would be protected under Sec. 7. The policy involved here, as indicated above, is a general rule that does not extend to activity or statements that would be protected under Sec. 7. Third, there was evidence in *GHR* that the respondent was hostile to the type of protected concerted activity that arguably would fall within the rule. Thus, the Board found that the respondent violated Sec. 8(a)(1) by threatening to sue an employee for making "false and defamatory" remarks during testimony before the United States Senate and a state environmental agency regarding pollution from the respondent's refinery business. In this case, there is no such evidence. Finally, unlike this case, the respondent in *GHR* committed other violations of Sec. 8(a)(1) in addition to maintaining the unlawful rule. For these reasons, we find that *GHR* is fundamentally distinguishable from the instant case.

First, the judge improperly reads the word "positive" in isolation. The Board has declined to parse the language of employers' rules in this manner. See *Lafayette Park*, supra at 825. Employees would not reasonably believe that an expectation that they represent the Company in a "positive and ethical manner," in the context of a prohibition on conflicts of interest, would prohibit Section 7 activity.

Second, the Board has found similar rules governing ethical conduct and employee attitudes to be lawful. See *Ark Las Vegas*, supra, slip op. at 8–9 (rule prohibiting "[c]onducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company"); *Flamingo Hilton-Laughlin*, supra at 287 (rule prohibiting "failure to have or maintain in management's sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors").

Third, as with the prohibition on "disloyal, disruptive, competitive, or damaging" conduct, the Respondent has not by any other actions led employees to believe that the requirement to represent the Company in a "positive" manner prohibits Section 7 activity.

Because we find that the General Counsel has not met his burden to show that the maintenance of this provision would reasonably chill employees in the exercise of their Section 7 rights, we reverse the judge and dismiss this allegation.

III. RULE PROHIBITING "SLANDEROUS OR DETRIMENTAL STATEMENTS"

The employee manual also contains a rule prohibiting "[v]erbal or other statements which are slanderous or detrimental to the company or any of the company's employees." The rule is found on a list of 19 rules prohibiting such egregious conduct as sabotage and sexual or racial harassment. There is no evidence regarding enforcement of the rule. The judge found that the mere maintenance of the rule violated Section 8(a)(1) because the rule did not define "slanderous or detrimental," and these terms could encompass protected concerted activity. We reverse.

We do not believe that the Respondent's rule can reasonably be read as encompassing Section 7 activity. In finding the rule unlawful, the judge relied on prior Board decisions holding that an employer may not lawfully proscribe statements that are "merely false," rather than "maliciously false."[3] The rule in this case, however, does not prohibit "merely false" statements. "Slander" is "the utterance of false charges or misrepresentations which defame and damage another's reputation." Webster's New Collegiate Dictionary (1979). "Detrimental" means "obviously harmful: damaging." Id. The Board has found similar rules, prohibiting certain improper conduct tending to damage or discredit an employer's reputation, to be lawful. See *Ark Las Vegas*, supra, at fn. 2 and slip op. at 8–9 (rules prohibiting conduct that "tends to bring discredit to, or reflects adversely on . . . the Company" and prohibiting "[c]onducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company"); *Flamingo Hilton-Laughlin*, supra at 288–289 (rule prohibiting "off-duty misconduct" that "tends to bring discredit to the Hotel"); *Lafayette Park*, supra at 826–827 (rule prohibiting "[u]nlawful or improper conduct" that affects "the hotel's reputation or good will in the community").[4] As in those cases, we find here that employees would not reasonably believe that the Respondent's rule applies to statements protected by the Act.

In addition, as with the "Conflicts of Interest" rule, the Respondent has not by other actions led employees to believe that the rule against "slanderous or detrimental" statements prohibits Section 7 activity.

[3] See, e.g., *Lafayette Park*, supra at 828; *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988*); American Cast Iron Pipe Co*., 234 NLRB 1126, 1131 (1978), enfd. 600 F.2d 132 (8th Cir. 1979).

[4] Our dissenting colleague cites two Board decisions that we find distinguishable: *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989), enfd. in relevant part 916 F.2d 932 (4th Cir. 1990), and *Technicolor Government Services*, 276 NLRB 383 (1985), enfd. 795 F.2d 916 (11th Cir. 1986).

In *Southern Maryland*, the Board adopted the judge's finding that a rule prohibiting "derogatory attacks" on hospital representatives violated Sec. 8(a)(1). The judge reasoned that "derogatory" meant "expressive of low estimation or reproach . . . disparaging, detracting, degrading, depreciatory." 293 NLRB at 1222 (quoting Webster's Third New International Dictionary (1981)). Therefore, an employee's assertion that the employer overworked or underpaid its employees would violate the rule. See id. The rule in the present case prohibits "detrimental" statements, not merely unfavorable ones. As stated above, "detrimental" means "obviously harmful" or "damaging." In addition, the respondent in *Southern Maryland* committed several other violations of Sec. 8(a)(1): it prohibited employees from engaging in solicitation or distribution during nonworking time in nonwork areas, it denied nonemployee union organizers access, and it engaged in surveillance of union activity. Here, there are no violations other than the alleged unlawful rules.

Technicolor, unlike the present case, did not involve allegations that a rule of conduct violated Sec. 8(a)(1). In *Technicolor*, the Board adopted the judge's findings that the respondent violated Sec. 8(a)(3) and (1) by discharging an employee for engaging in union and protected concerted activity. In addressing the respondent's argument that the employee's conduct was not protected, the judge made the statement quoted by our colleague that "not every form of concerted activity loses protection under the Act simply because it may have an ultimate detrimental impact upon an employer." Id. at 388. In contrast, there is no evidence of protected concerted activity in the present case.

Therefore, we find that the General Counsel has not met his burden to show that maintenance of this rule would reasonably chill employees in the exercise of their Section 7 rights. Accordingly, we reverse the judge and dismiss this allegation.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues, I agree with the judge that the Respondent violated Section 8(a)(1) by maintaining certain workplace rules which would reasonably tend to chill employees in the exercise of their Section 7 rights. I deal with each in turn.[1]

I. "CONFLICTS OF INTEREST" RULE

The Respondent's employee manual contains a rule entitled "Conflicts of Interest," which prohibits employees from engaging in any activity that "conflicts with, or appears to conflict with, the interests of the company, its customers, or its suppliers." The rule emphasizes that "the prohibitions included in this policy are not intended to be exhaustive and only include some of the more clear-cut examples." The rule then provides in relevant part:

> Employees are expected to represent the company in a positive and ethical manner and have an obligation both to avoid conflicts of interest and to refer questions and concerns about potential conflicts to their supervisor . . . .
>
> Employees are not to engage, directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company. Such prohibited activity also includes any illegal acts in restraint of trade. Tradesmen defines such disloyal, disruptive, competitive, or damaging conduct as including, but not limited to, employment with another employer or organization while employed by Tradesmen . . . .

As my colleagues recognize, in determining whether the mere maintenance of a rule violates Section 8(a)(1), "the appropriate inquiry is whether the rule[] would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).[2] Applying this standard, I agree with the judge that the Respondent violated Section 8(a)(1) by maintaining the provisions requiring employees to represent the Company in a "positive" manner and prohibiting employees from "engag[ing], directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company."

A. Rule Prohibiting "Disloyal, Disruptive, Competitive, or Damaging" Conduct

In finding that the Respondent did not violate Section 8(a)(1) by maintaining this provision, my colleagues rely on the Board's decisions in *Lafayette Park*, supra, and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), in which the Board found that similar rules did not violate Section 8(a)(1). In each of those cases, in dissent, I found that those rules did violate Section 8(a)(1), because they were overly broad and ambiguous and failed to define the area of permissible conduct in a manner clear to employees. Consequently, in my view, the rules had a reasonable tendency to cause employees to refrain from engaging in protected activities, rather than risk being disciplined for violating the rules.[3] See also *GHR Energy Corp.*, 294 NLRB 1011, 1012, 1030 (1989), affd. 924 F.2d 1055 (5th Cir. 1991) (Board adopts judge's finding that the respondent violated Sec. 8(a)(1) by promulgating a "disloyalty policy" prohibiting "actions

[1] I agree with my colleagues that the Respondent did not violate Sec. 8(a)(1) by maintaining its no-solicitation rule.

[2] In applying this standard, I disagree with my colleagues' reliance on the lack of evidence that the rules in this case have been enforced. Under Board and court precedent, the mere maintenance of a rule may violate the Act, even absent evidence of enforcement. See *Lafayette Park*, supra at 825; see also *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468, 478 (6th Cir. 2002) (affirming Board's finding that the mere maintenance of a rule violated Sec. 8(a)(1) even without enforcement, because the rule would have a reasonable tendency to discourage employees from engaging in Sec. 7 activities); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992) (affirming Board's finding that the mere maintenance of a rule violated Sec. 8(a)(1); observing that "[b]ecause of the likely chilling effect" of the rule, "the Board may conclude that the rule was an unfair labor practice even absent evidence of enforcement").

[3] See *Lafayette Park*, supra at 831 (Members Fox and Liebman, dissenting in part) (dissent finding that the respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting "[b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives"); id. at 832 (Members Fox and Liebman, dissenting in part) (dissent finding that the respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community"); *Flamingo Hilton-Laughlin*, supra at 289 fn. 7 (Member Liebman finding in dissent that the respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel").

In *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001), also cited by my colleagues, the judge found that the rules at issue were similar to rules found lawful by the majority (from which I had dissented) in *Lafayette Park*. In the absence of a majority to overrule that aspect of *Lafayette Park*, I joined then-Members Truesdale and Walsh in finding that the judge had correctly applied the majority decision in that case. See *Ark Las Vegas*, supra at fn. 2.

or statements . . . against the Company's interests which expose the Company to public contempt and/or ridicule or damage[] its business reputation or interfere[] with its ability to expand and grow"; the policy "excessively restrained" Section 7 activity "by imposing excessively broad restrictions upon [employees'] actions and statements").

In the present case, for the same reasons, I agree with the judge that the Respondent violated Section 8(a)(1) by maintaining the provision of its "Conflicts of Interest" rule prohibiting "conduct which is disloyal, disruptive, competitive, or damaging." The rule does not define any one of those terms. Although the rule does include two examples of conduct that would be prohibited by this provision, the examples are illustrative only. The rule expressly states that prohibited conduct is not limited to the examples listed in the rule. Therefore, I would not find that the examples are sufficient to define the area of permissible conduct in a manner clear to employees. Furthermore, the Respondent's rule is even broader than two of the rules in *Lafayette Park* and *Flamingo Hilton-Laughlin*, which proscribed "misconduct" or "unlawful or improper conduct." The rule in this case refers only to "conduct." In addition, unlike the rules in those cases, the Respondent's rule requires employees to refrain from engaging in the prohibited conduct even "indirectly," further obscuring the rule's scope.

Therefore, I would find that the rule prohibiting employees from "engag[ing], directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company," would reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, I would find that the Respondent violated Section 8(a)(1) by maintaining this rule.

B. Requirement that Employees Represent the Company in a "Positive" Manner

I also agree with the judge that the Respondent violated Section 8(a)(1) by maintaining the provision that employees must "represent the company in a positive . . . manner." Employees could reasonably conclude that this rule prohibits Section 7 activity, to the extent that such activity involves making negative comments about the Respondent or expressing disagreement with current terms and conditions of employment. See *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932 (4th Cir. 1990) (rule prohibiting "derogatory attacks" on hospital representative was unlawful, because it would encompass union propaganda that "places the Hospital . . . in an unfavorable light"); see also *Flamingo Hilton-Laughlin*, supra at fn. 2 (Member Liebman, in dissent, finding that the respondent violated Section 8(a)(1) by maintaining a rule prohibiting "failure to have or maintain in management's sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors"). Therefore, I agree with the judge that this provision would reasonably tend to chill employees in the exercise of their Section 7 rights.

II. RULE PROHIBITING "SLANDEROUS OR DETRIMENTAL" STATEMENTS

Contrary to my colleagues, I would also find that the Respondent violated Section 8(a)(1) by maintaining a rule prohibiting "detrimental" statements about the Respondent or any of its employees.

The full text of the rule prohibits "[v]erbal or other statements which are slanderous or detrimental to the company or any of the company's employees." It is included on a list of 19 offenses that the manual states "will generally subject an employee to immediate dismissal." The rule does not define "detrimental" and includes no examples of what would constitute a "detrimental" statement. In arguing that the rule is lawful, the Respondent relies on decisions stating that, while an employer may not lawfully prohibit "merely false" statements, it may lawfully prohibit "maliciously false" ones. See, e.g., *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979).

My colleagues find the rule lawful, in part because it is similar to rules found lawful in *Lafayette Park* and *Flamingo Hilton*, proscribing certain conduct that tends to discredit or affect the reputation of the employer. See *Flamingo Hilton-Laughlin*, supra at 288–289 (rule prohibiting "off-duty misconduct" that "tends to bring discredit to the Hotel"); *Lafayette Park*, supra at 826–827 (rule prohibiting "[u]nlawful or improper conduct" that affects "the hotel's reputation or good will in the community"). For the same reasons stated in my partial dissents in those cases, I would find the rule in the present case unlawful.[4] Moreover, the rules in those cases were limited to "misconduct" or "unlawful or improper conduct," while the rule in this case applies to any "statements."

In addition, I would reject the Respondent's argument that the rule is lawful under precedent allowing an employer to prohibit "maliciously false" statements. Although the Respondent may have intended the rule to apply only to maliciously false or maliciously damaging statements, that is not clear from the text. The rule says nothing about malice. My colleagues observe that Web-

[4] See *Flamingo Hilton-Laughlin*, supra at fn. 7 (Member Liebman, dissenting in part); *Lafayette Park*, supra at 832 (Members Fox and Liebman, dissenting in part).

ster's New Collegiate Dictionary defines "detrimental" as "obviously harmful: damaging." Under that definition, even true statements protected by the Act—such as statements heard by the public during informational picketing that an employer pays substandard wages or otherwise treats employees unfairly—may have a damaging or "detrimental" effect on an employer.[5] In this regard, the Respondent's rule is even broader than rules prohibiting "merely false" statements, which the Respondent admits are unlawful under Board precedent. See *Southern Maryland*, supra at 1222 (rule prohibiting "derogatory attacks" on hospital representatives went beyond a prohibition on "merely false" statements "to prohibit even truthful union propaganda, which may be regarded as 'derogatory' because it places the Hospital or its representatives . . . in an unfavorable light").

Finally, in my view, the rationale for finding rules punishing "merely false" statements unlawful is also applicable here. In decisions involving those rules,[6] the Board has cited *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), in which the Supreme Court observed that false statements do not lose the protection of the Act unless they are made with "actual malice, 'a deliberate intention to falsify' or 'a malevolent desire to injure.'" Id. at 62. The Court in *Linn* cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court explained that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" Id. at 271–272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Just as rules prohibiting "false" statements sweep too broadly and are likely to deter even truthful speech, so, too, would the Respondent's prohibition on "detrimental" statements tend to cause employees to steer wide of the prohibited zone and not voice criticism of their terms and conditions of employment.

For these reasons, in my view, the Respondent's rule fails to define the area of permissible conduct in a manner clear to employees, and consequently has a reasonable tendency to cause employees to refrain from engaging in protected activities rather than risk being disciplined for violating the rule. Therefore, I agree with the judge that the Respondent violated Section 8(a)(1) by maintaining the rule.

[5] Cf. *Technicolor Government Services*, 276 NLRB 383, 388 (1985), enfd. 795 F.2d 916 (11th Cir. 1986) ("It is axiomatic . . . that not every form of concerted activity loses protection under the Act simply because it may have an ultimate detrimental impact upon an employer."); see also *Aztech Electric Co.*, 335 NLRB 260, 268–269 (2001) (Members Liebman and Walsh, concurring) ("The fact that the immediate object of the act by which the benefit to [workers] is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business.") (quoting Justice Oliver Wendell Holmes's dissent in *Vegelahn v. Guntner*, 167 Mass. 92, 104 (1896)).

[6] See *St. Joseph Hospital Corp.*, 260 NLRB 691, 700 (1982); *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978), enfd. 600 F.2d 132 (8th Cir. 1979).

David A. Nixon, Esq. and *Daniel G. Zarate, Esq.*, for the General Counsel.

Vincent T. Norwillo, Esq., for the Respondent.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issues presented are whether the Respondent's discharge of Russell Terrell and its maintenance of certain employee policies violate Section 8(a)(1) of the National Labor Relations Act (Act).[2]

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. RESPONDENT'S BUSINESS OPERATIONS

The Respondent operates a construction labor leasing business. The Respondent maintains an office in Kansas City, Missouri, which is the operation involved in this case. The Respondent's employees include persons who work as electricians. Respondent pays the wages and benefits for its employees and charges its clients an hourly "bill-out" rate for the labor services of each employee assigned to the client.

At the times relevant to this case the Respondent's Kansas City supervisory hierarchy consisted of General Manager John Strharsky, field representative, Martin Talbot, and recruiters, Joe Phillips, and Brian Faulkner. Strharsky and Faulkner no longer worked for the Respondent at the time of the hearing.

III. RUSSELL TERRELL

A. Terrell's Hire and Work at Tann Electric

Russell Terrell was hired by the Respondent as an electrician on May 4, and assigned to work for Tann Electric. Terrell worked for Tann through May 10, at an hourly wage of $18. Terrell testified that when he reported for work on May 10, Tann's owner said that there was no work for him that day. Terrell explained that he had driven a long way and did not want to go home empty-handed. Tann allowed him to stay and work for 6 hours.

Terrell telephoned Phillips that evening and reported he did not get a full day of work. Terrell complained that it was not economical for him to drive such a long distance to work and he did not want to stay on the Tann job. Terrell then spoke with Talbot who said that he would place him on a job for Hope Electric in St. Joseph, Missouri, that is closer to Terrell's resi-

[1] This case was heard at Overland Park, Kansas on May 10, 11, and 30, 2001. All dates in this decision refer to the year 2000 unless otherwise stated.

[2] 29 U.S.C. § 158 (a)(1).

dence in Chillicothe, Missouri. Talbot credibly testified that he had gotten Hope Electric to pay a high rate of pay for electricians who would work at the St. Joseph jobsite. Terrell was a beneficiary of this higher pay rate.

Talbot credibly testified that he was telephoned by Tann supervisor, Randy Smith, on May 10, and told that Terrell's services were no longer required. According to Talbot he was also told by Smith that he had some concerns about Terrell working on live circuits and his overall work performance. As a result of his conversation with Smith, Talbot recorded a note in Terrell's computer file reciting Smith's comments concerning Terrell's performance[3] Talbot also reported Smith's comments about Terrell's work performance to Strharsky.

B. Terrell is Assigned to Hope Electric Job

Terrell began work for Hope on May 11, at the Johnson Controls job in St. Joseph, Missouri. Terrell worked at this project through Friday, May 19. He was terminated by the Respondent on the following Tuesday, May 23.

Electricians met each morning at 7 a.m. in order to receive their assignments for the workday. Terrell was assigned to work for Hope foreman, Bill Pryor. Supervisor Pryor and Respondent's employees Joe Talbot, Dale Flees, and Roy Taylor testified that Terrell was frequently late arriving at work. Terrell denied that he was late for work save for the morning of May 19. Based on the comparative demeanor of these witnesses, I find the testimony of Pryor, Joe Talbot, Flees, and Taylor to be more credible when compared to Terrell. I credit their testimony that Terrell was frequently late for work.

C. Events of May 17

Talbot testified that he visited the Hope jobsite on May 17 and received several complaints from Respondent's employees about Terrell's work. His son, Joe Talbot, an apprentice electrician, complained Terrell was unsafe while operating a scissor lift.

Joe Talbot testified that Terrell had raised the scissor lift as Joe was attempting to get off the platform. This knocked Joe to the ground. Joe stated that he did not believe he was safe working around Terrell because of this incident and because Terrell's breath smelled of alcohol. Joe testified that he confronted Terrell that morning about smelling of alcohol. Terrell denied he had been drinking that morning but told Talbot that he had been out drinking late the previous night. Terrell testified that he had a cold while working at Hope and took the patent medication Nyquil that might lead a person to suspect he had been drinking. Terrell conceded that he did drink on several nights while working at the Hope project. He denied that he had been drinking the Friday night before the alleged Saturday scissor lift episode described by Joe Talbot. He likewise denied that he had ever operated the scissor lift in an unsafe manner. Based on the respective demeanor of the two witnesses, I credit Joe Talbot's testimony relating Terrell's accident involving him. I likewise credit Joe Talbot as to their conversation concerning the possibility that Terrell had been drinking.

As a result of his concerns about Terrell's safety, Joe Talbot sought out another electrician, Bill Flees, and explained the situation to him. Flees directed Joe Talbot to stay and work with him.

Joe Talbot told his father that other employees had stated that Terrell smelled of alcohol while at work. Joe Talbot testified he passed on his observations to his father because of his concern that Terrell was a safety hazard. Joe Talbot also reported he observed Terrell arriving late for work on more than one occasion and questioned his father as to how Terrell was allowed to get away with that conduct. Joe likewise complained to Martin that Terrell had been borrowing the personal hand tools of other employees without their permission and proclaiming to fellow employees that he was earning $30 per hour. Joe Talbot testified that he noted these later points because they seemed to be upsetting fellow employees. Martin Talbot told his son to return to work and that he would speak to Terrell. Martin Talbot knew that Terrell was not earning anywhere close to $30 per hour. Terrell was being paid $19.50 for his work on the Hope project. Respondent's other electricians were earning similar amounts while working at Hope Electric.

Martin Talbot testified that he recalled that Joe and another employee spoke to him on May 17 concerning complaints against Terrell. He thought that the other employee was Charlie Fiehler. In this regard I find that Talbot's recollection is incorrect. Fiehler testified that he did not complain to Talbot about Terrell. While I find that Martin Talbot was mistaken that the second employee was Fiehler, I do find that Talbot did hear complaints regarding Terrell from a second employee on May 17. Thus, Respondent's employee Roy Taylor testified he talked to Martin "on a Tuesday or a Wednesday" about Terrell. Taylor related that he had heard complaints from other employees as well as observing, in part, that Terrell smelled of alcohol. He testified that Terrell appeared to be "terribly hung over" on the job, reported late for work, that he had heard of the scissor lift incident with Joe Talbot, that Terrell was borrowing tools without authorization, and was claiming to be making $30 per hour. As a result of his concern about Terrell he told Martin Talbot that he needed to watch Terrell "real close."

Martin Talbot testified that later on the morning of May 17 he spoke to Terrell about the complaints. Talbot testified that Terrell denied operating the scissor lift in an unsafe manner and denied that he was operating the lift at a time when Joe Talbot was getting off the lift. Talbot reminded Terrell that he needed to operate equipment safely and always have a regard for being safe on the job. Talbot asked Terrell if he was telling other employees making $30 an hour or exaggerating his wage rate. Terrell did not deny he was doing such things but told Talbot that "it was no big deal." Talbot told him if he was going to tell everyone what he was making that he needed to be truthful. He told Terrell that "this is a team, they have got you guys working in teams, be a team player." Terrell replied, "Okay, fine."

Talbot testified that he reported the Terrell situation to Strharsky on the telephone that day. He also made a note of the matter on Terrell's computer records—including an observation that he did not smell any alcohol on Terrell on that date.

[3] Counsel for the General Counsel's Br. asserts that the Respondent's computer entries concerning Terrell for "May 5 forward, [were] specious—pretextually created, *post hoc*—to facially support the unlawful discharge." I find that the counsel for the General Counsel did not prove this assertion.

Terrell denies that he spoke to Martin Talbot on May 17. I have accessed the demeanor of both Martin Talbot and Russ Terrell concerning their testimony regarding May 17. Talbot impressed me as a truthful witness who detailed the reports he had received about Terrell. He was convincing in relating the conversation he had with Terrell on May 17, in which he warned him about his conduct. Talbot's testimony of his actions on that day are corroborated by the note he later entered in Terrell's computer file. Terrell by his demeanor was not convincing in his denial that Talbot did not confront him with work complaints on May 17. I, therefore, credit Talbot. Likewise I do not credit the denials by Terrell that he borrowed fellow employees tools without permission, drove the scissor lift in an unsafe manner, exaggerated his pay, and was frequently tardy. Terrell admitted he may have smelled of alcohol while on the job, but attributed that to the taking of cold medicine. I find that some of Terrell's fellow workers smelled alcohol on him while on the job but that there is no evidence he drank any alcoholic beverage while at work.

D. Events of May 19

Friday, May 19, was the payday for Respondent's employees on the Hope Electric project. Martin Talbot went to the jobsite on that day to deliver the paychecks. He arrived at approximately 7 a.m. and began giving out the checks as he encountered the employees. He spoke with electrician Dale Flees who told Talbot that the Respondent had a problem in the form of Terrell because he came to work smelling like alcohol, operated the lifts unsafely, was late to work, took Flees' personal hand tools without permission, and abused them. Flees also reported that Terrell continued to claim he was making much more ($30 per hour) than other employees. Flees testimony confirmed his complaints about Terrell. Flees testified that he confronted Terrell several times about smelling of alcohol. Terrell told him he had been taking cold medication. Flees also testified that Terrell borrowed his tools without permission and he asked him to stop the practice.

Talbot next engaged employee Roy Taylor in conversation. According to Talbot's testimony, Taylor advised him that he had "better take care of Russ Terrell." Taylor complained that Terrell was unsafe, smelled of alcohol, was late to work, took other employees tools, and claimed he earned more than other employees. Taylor testified he recalled telling Talbot, "This guy you got to watch close." Taylor did not recall that he gave Talbot any specifics about what his concerns were with Terrell. I found Taylor to be somewhat hazy as to what he said to Talbot. Talbot demonstrated a better recall of their conversation. While the theme of their conversation is not in conflict, I find that Taylor did advise Talbot of the problems he had concerning Terrell.

Michael Webb, another of Respondent's electricians, was the next employee to confront Talbot regarding Terrell. Webb stated that Terrell had almost hit a Hope Electric employee while operating a lift (testimony showed this person was allegedly Ralph Evans). Webb also complained that Terrell smelled of alcohol, and was always late arriving at work. Webb expressed his dissatisfaction that Terrell was an unsafe worker and was telling everyone he was making $30 an hour. Webb concluded the conversation by telling Talbot that he did not want to work with or around Terrell. Talbot told Webb he would take care of the situation.

Martin Talbot then spoke to his son Joe who reiterated his complaints about Terrell that he had voiced on May 17. He reported that it was his opinion that Terrell was continuing to work unsafely, smelled of alcohol, and continued to come to work late. Joe noted that Terrell had not even arrived for work yet that morning even though it was approximately 7:30 a.m. when this conversation was taking place. The workday started at 7 a.m.

Chris Wright was the next employee that Martin Talbot encountered. Wright joined in voicing complaints about Terrell's performance on the job. He told Talbot his concern was such that he no longer wanted to work with Terrell based upon reports of his unsafe work habits as well as Wright's belief that Terrell was responsible for the loss of one of his hand tools. Wright likewise related that Terrell continued to falsely claim he was earning $30 per hour. Talbot told Wright he would discuss the matter with Terrell.

Shortly after speaking with Wright, Talbot observed Terrell arrive at work. According to Talbot it was approximately 7:40 a.m.—40 minutes past the starting time. Talbot testified he went up to Terrell and smelled alcohol on him. Talbot testified that he confronted Terrell about the odor and stated that his coworkers reported he had been coming to work hungover and smelling of alcohol. Terrell admitted having "a few beers" the night before, but blamed the alcoholic odor on cold medicine he was taking. Talbot told Terrell that the use of alcohol while working could get him fired. Terrell apologized for being late but said he had a flat tire that morning.

Talbot said he had received reports that Terrell had almost hit another employee with the scissor lift. Talbot also said that Terrell might be responsible for a missing tool; and that Terrell had continued to falsely tell other employees what he earned. Terrell denied operating the scissor lift that nearly struck Hope Electric employee Ralph Evans, borrowing Wright's missing tool, and being late before that morning. According to Talbot, Terrell admitted that he had continued to exaggerate his wage rate but that the matter was not a big deal and the other employees were big boys and could handle it. Talbot testified that he again counseled Terrell about the importance of job safety, not taking other employees tools, being on time to work, and not telling fellow employees that he was making an exaggerated wage rate.

Talbot gave Terrell two paychecks. The first check was for hours worked at Tann Electric. The second check was for Terrell's first 2 days of work on the Hope jobsite. Terrell observed that his hourly rate had been increased to $19.50. Talbot testified that he told Terrell that the increase was an effort to address his complaints about needing more money for gas and would be effective for the Hope job only. Talbot testified that he concluded the conversation by reiterating that Terrell should be honest when discussing his wage rate.

Terrell went to work and Talbot remained at the jobsite. Talbot was approached by Wright and Flees after the employees had finished their mid-morning break. They told him that during the break Terrell had bragged that he had gotten a raise and was now earning $32 an hour. Both of the employees were upset and Talbot told them he would see what he could do about the situation. Talbot then sought out Terrell and asked him what he was doing, that they had just discussed his misrepresenting what he was being paid to other employees and the employees were upset with

him again. Talbot said he did not care if Terrell wanted to talk about his wages with other employees but to tell the truth. He said he had only told the employees he had gotten a raise and that had "ticked" them off.

Martin Talbot testified that he then radioed John Strharsky and told him about the various complaints he was getting from employees about Terrell. Strharsky said he wanted to look into the matter and instructed Talbot to have Terrell telephone Strharsky after work that day. Talbot then relayed Strharsky's message to Terrell.

Charlie Fiehler, a former employee of the Respondent, testified on behalf of the Government at the hearing. On the subject of Terrell exaggerating his wage rate he recalled hearing reports from other employees that Terrell was claiming to be making $22.50 per hour. Thereafter, in the presence of other employees, he challenged Terrell about making that much and asked him to produce his check stub to verify the claim. Terrell refused to show Fiehler his pay stub.

Hope Electric foreman Bill Pryor testified that Terrell regularly was assigned to his crew. He testified, however, that on one occasion Terrell was placed with Foreman Larry Cogdill's crew. At the end of that day Cogdill discussed Terrell with Pryor saying that Terrell "reeked of alcohol: and said he did not want Pryor to put Terrell near his crew again because he did not want somebody that was drinking on his crew. Pryor testified that he had also smelled alcohol on Terrell on one occasion.

Prior further testified that he also heard a discussion by Hope Electric employee Ralph Evans and a couple of other employees. These employees were talking about how Terrell had carelessly operated the scissor lift while driving down an aisle and almost hit a worker. Pryor also recalled that Terrell was late to work by 5 to 10 minutes on several occasions.

Pryor's testimony of Terrell's possible drinking was based on his own observation and the report received from foreman Cogdill. His testimony about Terrell's alleged unsafe operation of the scissor lift was based on the hearsay of employee discussions he overheard. His knowledge of Terrell arriving late for work on several occasions was based upon his own observation. I found Pryor, who was called as the Government's witness, to be a credible, forthright, and disinterested witness. I credit Pryor's testimony. I have also considered Pryor's testimony to the extent that it may corroborate other witnesses who testified as to Terrell's reputation on the job and his denials of drinking, being late, and working unsafely.

Terrell testified that the second conversation occurred at the 9 a.m. break period when Talbot handed him two paychecks. Terrell noticed that he was being paid $1.50 more per hour and he thanked Talbot for the increase. Terrell testified that Talbot replied that he had received good reports about him and was able to get him the raise. According to Terrell, Talbot also said there was plenty of work in the St. Joseph area and the Respondent wanted to keep Terrell around.

Terrell recalled that he left Talbot and returned to work with six to eight other employees including Dale Flees and Joe Talbot. Elated over his raise, Terrell testified that he told them it was a great place to work, and there was plenty of work coming up. He said that he was glad to have found work so quickly upon coming back from Colorado and to feel that he had a little security going because he had just been given a $1.50 raise. Terrell did not recall that the other employees reacted to what he said about his raise. Terrell denied ever telling anyone that he was earning $30 per hour or any other inflated amount.

Terrell testified that he had a third conversation with Talbot around 11 a.m. Terrell remembered Talbot told him that employees had come to him saying that they all wanted a raise because he had mentioned his raise to them. Terrell testified that Talbot said this caused morale problems and that Terrell's discussions of his wages was just going to cause a lot of friction on the job so he was not to disclose that information. Terrell testified that he apologized and said it would not happen again. Talbot denied that he told Terrell he could not discuss his wages with other employees.

The respective demeanor of Talbot, Terrell, and others as they testified about the events of May 19, has been carefully taken into account. Again Talbot was credible in relating the sequence of conversations and what was said by and to employees, including Terrell. Terrell was not convincing in denying that he ever told other employees that he was earning an exorbitant amount in wages. Terrell was not credible in relating that Talbot praised his work. Terrell was not convincing while testifying that Talbot did not criticize his work performance on May 19. In sum, I credit Talbot and the other employees who testified concerning the events of that day over the denials of Terrell. Rather than being praised for his work, I find that Talbot did reprimand Terrell for his conduct as set forth above.

The Government alleges that the Respondent unlawfully prohibited employees from discussing their wages when on May 19, Talbot allegedly told Terrell he was not to discuss his wages with anyone. As I have credited Talbot's testimony in which he denied making such a statement, I find that the Respondent did not violate the Act as alleged in this regard.[4]

E. Employees Complain to Strharsky

After work on May 19, employees Roy Taylor and Dale Flees individually drove from the jobsite in St. Joseph, Missouri, to the Respondent's business office in Kansas City. Taylor was the first to arrive at the office where he sought out Strharsky. Taylor was upset at having to work with Terrell and told Strharsky that "enough is enough" and that he "would not work with this guy [Terrell] anymore." Strharsky questioned Taylor why he felt that way and Taylor related that Terrell was an unsafe worker, smelled of alcohol, was late to work, borrowed employees' tools without permission, and stated he was earning an uncommon amount in wages.

Flees then complained to Strharsky about Terrell. Flees said that he thought Terrell was a safety hazard and he also said that he did not want to work around him. Flees reported that he had observed Terrell acting incoherently, dropping tools, and smelling of alcohol. Flees also discussed his concern about Terrell

[4] In making this assessment I have also considered the conflicting record testimony of other alleged "gag" rule statements made by Respondent's agents. These other purported instances are not alleged as violations of the Act and, in any event, I find that they are not dispositive in determining what Talbot said to Terrell on May 19, regarding that subject.

borrowing tools, his being late for work, and his bragging about making $30 an hour in wages.

Strharsky directed an office employee to telephone Terrell and have him call Strharsky before reporting to work on Monday. Strharsky next discussed Terrell with Martin Talbot and they reviewed Talbot's conversations with Terrell and other employees that had occurred earlier in the day. Talbot related Terrell's lack of safety in operating the scissor lift, including what he had heard about Terrell almost hitting Ralph Evans, smelling of alcohol, tardiness, and borrowing of tools. Strharsky also reviewed Terrell's computer notes that Talbot had updated with a summary of the day's events.

Terrell testified that he received a telephone answering machine message on May 19, after work that he should call Strharsky. He testified that he attempted to call Strharsky but was unsuccessful in reaching him. Strharsky testified that over the weekend he considered Terrell's record including his allegedly working on live circuitry while employed at Tann Electric and his unsafe operation of the scissor lift at the Hope Electric job. Strharsky testified that he also considered the reports that Terrell smelled of alcohol while working. Strharsky then made the determination that Terrell was to be terminated.

F. Terrell's Termination

Terrell telephoned the Respondent's Kansas City office on Monday before any personnel were present and left a message that he would not be at work that day. When Strharsky learned that Terrell was not coming to work he attempted to call him at least twice that day. He was unable to speak to Terrell that day. Strharsky and Terrell finally spoke on the telephone on Tuesday, May 23.

Strharsky told Terrell he was being discharged and explained that the decision had been made because of his safety violations, tardiness, tool misappropriation, showing the effects of alcohol consumption at work, and repeated exaggeration of his wage rate. Strharsky emphasized that he considered safety a particular concern and to ignore it was to jeopardize his fellow workers. Strharsky also testified that he asked Terrell why he was telling everybody he was making $30 an hour. According to Strharsky, Terrell made little, if any reply to his statements nor did he dispute the accusations concerning his conduct.

Terrell testified that Strharsky said that there was a problem because every contractor he was sent to sent him back and that Tann Electric and Hope Electric would no longer accept him. According to Terrell, Strharsky said that he had received several complaints that Terrell was careless, a low producer, late every day, and also described "a lot of the things that were described here [in the hearing] earlier." Terrell testified that he told Strharsky that the reasons he was given were ridiculous, that he got a raise on Friday and he had heard nothing but good reports about his work. He said he thought the whole discussion was silly and he did not want to talk about the matter any longer with Strharsky.

Strharsky, who no longer works for the Respondent, impressed me as a truthful witness who had seriously considered the flaws reported to him concerning Terrell's work performance. He credibly testified as to the reasons he relied upon in discharging Terrell. I credit his testimony as to those reasons as well as his version of what was said in his May 23 telephone conversation with Terrell.

IV. ANALYSIS OF TERRELL'S DISCHARGE

The parties agree that the key to assessing Terrell's discharge is the credibility of the various witnesses. The Government concedes that "if Respondent's evidence concerning asserted deficiencies in the performance or conduct of alleged discriminatee Terrell were to be credited, Respondent would prevail on the discharge, on the twofold basis of just cause and absence of protected activity. The General Counsel does not contend that conduct entailing an employee's maliciously misrepresenting his compensation in statements to co-workers is protected under the Act." (GC Br. at 1–2).

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of the Act. The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd. 947 F.2d 953 (10th Cir. 1991); *Presbyterian St. Luke's Medical Center*, 723 F.2d 1468, 1478–1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel* Corp., 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

The credited evidence shows that Terrell caused great concern among his fellow employees as to his unsafe work practices, smelling of alcohol, borrowing tools without permission, being late to work, and misrepresenting his wages. These concerns were reported to Talbot, and most importantly, Strharsky. On Friday, May 19, Strharsky had received the reports of his subordinate supervisor Talbot about the situation. He was also faced with the vehement reiteration of the complaints from Taylor and Flees, both of whom were refusing to work with Terrell particularly because of their concerns about his unsafe practices. Against this background Strharsky made his decision to discharge Terrell.

The Government's theory of violation relies on Terrell's denials that he ever misrepresented his wages, worked unsafely, worked in an intoxicated state, was tardy to work, and borrowed tools. The Government rightly concedes that its case stands upon Terrell being credited. As found above, Terrell's denials in regard to these matters are not credited. In sum, I find that Terrell did engage in the work practices that concerned his fellow employees and that he did exaggerate his pay rate. With regard to Terrell's pay rate puffing I find that he was not thereby engaged in protected concerted activity. *Plastic Composites Corp.*, 210 NLRB

728, 737–738 (1974) (Discharge of employee who willfully misrepresented wages at prior employer to fellow employees not a violation of the Act.) I further find that the Respondent has shown that the discharge of Terrell resulted from numerous complaints about his work performance and that Strharsky would have terminated him regardless of any misrepresentations he made to fellow employees about his wages. I conclude, therefore, that the Respondent's discharge of Terrell was not a violation of Section 8(a)(1) of the Act. *Wright Line*, supra.

V. THE RESPONDENT'S DISPUTED EMPLOYEE MANUAL POLICIES

The Respondent distributes a Field Employee Policy Manual to its workers. The Government alleges that the Respondent's manual contains particular provisions that violate Section 8(a)(1) of the Act. The Respondent denies that any such policies run afoul of the statute.

A. No-Solicitation Policy

The Manual states the Respondent's no-solicitation policy as follows:

Employees shall not engage in any kind of solicitation during times they are expected to be working. (GC Exh. 3, p. 15.)

A violation of this no-solicitation policy will subject an employee to discipline that may include discharge. Talbot testified that the Respondent does not prohibit employees from carrying on casual conversation with one another during the course of their workday over such subjects as sports.

The Government's complaint does not contend that the Respondent's no-solicitation policy is facially invalid. The complaint rather alleges that the rule "disparately" prohibits employees from engaging in protected activity. No evidence was introduced to show the Respondent's no-solicitation rule was ever disparately, or otherwise, invoked to prohibit employees from engaging in concerted protected activity, including union activity. I find that the Respondent's no-solicitation rule does not violate Section 8(a)(1) of the Act.

B. Conflicts of Interest

Respondent's Employee Handbook contains a section entitled Conflicts of Interest. The Government believes certain language in that section violates the Act because it interferes with employees' right to engage in protected concerted activity. (GC Exh. 3, at p. 6.)

1. Disloyal conduct

"Employees are expected to represent the company in a positive . . . manner . . . ."

"Employees are not to engage, directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive or damaging to the company."

Each of these policies could prohibit employee protected concerted activity. Thus, employees who discussed their opinions that the Respondent paid low wages or was "unfair" to them could be seen as not representing the company in a "positive manner." Likewise, employees engaged in union activity, "either on or off the job," could be viewed as being "disloyal" or "disruptive" towards the Respondent. The Respondent's policy expressions in this regard are too broad and contravene the mandate of the Act that employees are free to engage in protected concerted activities. I find that these policy expressions violate Section 8(a)(1) of the Act. *Southern Maryland Hospital Center*, 293 NLRB 1209, 1221–1222 (1989).

2. Dual employment

The conflicts of interest section also prohibits workers from being employed by other entities:

> "Tradesman defines such disloyal, disruptive, competitive, or damaging conduct as including, but not limited to, employment with another employer or organization while employed by Tradesman."
>
> "Employees are not to accept any employment relationship with any organization which does business with the company or is a competitor of the company. This prohibition on employment includes serving as an advisor or consultant to any such organization, unless that activity is conducted as a representative of the company."

Another part of the manual prohibits employees from:

> "Acceptance and/or continuation of employment with an organization . . . which is a 5competitor of the company"(GC Exh. 3, at p. 14, Item 19).

The Government's brief argues that the manual's dual employment references "infringes upon employee statutory rights to join, support or assist a union or serve as a 'salt' [an employee who seeks employment with a purpose to champion union organization at that business]. . . . In this regard, it is noteworthy that Respondent conceded that it considers unions to be its competitor in providing employees to contractors."

The Board holds that a dual employment rule is not a violation of the Act absent some evidence of its discriminatory application. *Little Rock Electrical Contractors*, 327 NLRB 932, 941 (1999). The Government makes no allegation that Respondent has applied its policy in a discriminatory manner or that its promulgation was unlawfully motivated. I find that the Respondent's dual employment policy does not violate Section 8(a)(1) of the Act. *Willmar Electric Service*, 303 NLRB 245, 246 fn. 2 (1991), enfd 968 F.2d 1327 (D.C. Cir. 1992).

C. Confidentiality

Respondent's Employee Handbook subjects employees to dismissal for "Disclosing confidential or proprietary information to . . . third parties" (GC Exh. 3, at p. 14, no. 10.) The Manual also states: "It is the policy of the company that the internal business affairs of the organization, particularly confidential information and trade secrets, represent proprietary assets that each employee has a continuing obligation to protect." (GC Exh. 3, p. 5.)

The Supreme Court instructs that an employer's rules of conduct for employees involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments . . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945). The Board standard for assessing whether the mere maintenance of a rule violates Section 8(a)(1) is whether the rule would reasonably tend to chill employees in

the exercise of their Section 7 rights. *Lafayette Park* 35 *Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If the rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice, even absent evidence of enforcement. *NLRB v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation*, supra, 324 U.S. at 803 fn. 10.

The Respondent's rule seems designed to protect its substantial and legitimate interest in maintaining the confidentiality of private information concerning its business operations. The terms of the Respondent's confidentiality rule do not prohibit employees from discussing wages or working conditions. Thus, the Respondent's rule neither prohibits discussion of specific terms and conditions of employment nor forbids conduct that is clearly a protected Section 7 right. No evidence was presented that the confidentiality rule was ever invoked to prohibit employees from engaging in Section 7 activity. I find that employees would not reasonably interpret the rule as prohibiting discussion of wages and working conditions. I conclude that the Respondent's confidentiality rule does not violate Section 8(a)(1) of the Act. *K-Mart*, 330 NLRB 263 (1999).

D. Slanderous or Detrimental Statements

The Respondent's Employee Manual contains a rule that prohibits employees from making: "verbal or other statements which are slanderous or detrimental to the company or any of the company's employees." (GC Exh. 3, p. 14 no. 18). The Government alleges that this rule would leave uncertain the limitations of what an employee can say in expressing opinions about the Respondent during an organizing campaign (e.g., the employer is "cheap" or "unfair.")

The Board holds that various similar policies violate the Act. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) ("Making false, vicious, profane or malicious statements toward or concerning the . . . "employer or its employees.); The Respondent's handbook does not attempt to define "slanderous or detrimental." Presumably any employee's statement judged by the Respondent to be untruthful concerning the company could fall in this broad category of statements. The term "detrimental" is especially generalized and subject to the Respondent's capacious interpretation. The scope of employee opinions that might fall within such a definition is expansive and could easily include protected activity. I find that this policy is too broad to avoid the sanction of the Act and I conclude that the Respondent's maintenance of its "slanderous and detrimental" rule is a violation of Section 8(a)(1) of the Act. *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979).

CONCLUSIONS OF LAW

1. Tradesmen International is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The International Brotherhood of Electrical Workers, Local Union No. 545, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act.
4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]